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5 UNITED STATES DISTRICT COURT  
6 WESTERN DISTRICT OF WASHINGTON  
7 AT TACOMA

8 SUSAN CURWEN,

9 Plaintiff,

10 v.

11 MARK J. DYNAN, et al.,

12 Defendants.  
13

CASE NO. C11-5598BHS

ORDER

14 This matter comes before the Court on Defendants' motion to compel arbitration  
15 (Dkt. 19). The Court has considered the pleadings filed in support of and in opposition to  
16 the motion and the remainder of the file and hereby denies the motion for the reasons  
17 stated herein.

18 **I. PROCEDURAL AND FACTUAL BACKGROUND**

19 On August 2, 2011, Plaintiff Susan Curwen ("Mrs. Curwen") filed a complaint  
20 alleging claims against Defendants for discrimination, unlawful retaliation, wrongful  
21 termination, outrage, whistleblowing and breach of contract. *See* Dkt. 1. On October 27,  
22 2011, Defendants filed the instant motion to compel arbitration. Dkt. 17. On November

1 7, 2011, Mrs. Curwen responded (Dkt. 19) and on November 11, 2011, Defendants  
2 replied (Dkt. 22).

3 Mrs. Curwen's husband, Greg Curwen ("Mr. Curwen"), joined Gierke, Curwen,  
4 P.S. ("the firm") in 1974. Dkt. 1 at 2. Mrs. Curwen was the office manager of the firm  
5 for many years. *Id.* Mrs. Curwen's claims against Defendants stem from her time as an  
6 employee of the firm. *See id.* Mr. Curwen also filed claims against Defendants in a  
7 separate action in Pierce County Superior Court and the action is now pending in  
8 arbitration. *See Curwen v. Gierke Curwen, PS*, Pierce County Superior Court, Cause No.  
9 11-2-12271-4.

10 On January 8, 2008, Mrs. Curwen signed a consent form that was attached to the  
11 Second Amended Shareholder Agreement ("Shareholder Agreement"), an agreement that  
12 had been signed by Mr. Curwen and the three other shareholders of the firm. *See* Dkt.  
13 20, Ex. C. The consent form states that Mrs. Curwen agrees to be bound by the terms and  
14 provisions of the Shareholder Agreement, to the same extent that her spouse is bound by  
15 the terms and provisions of the agreement. *Id.*, Ex. C at 51. The same consent form was  
16 signed by the spouses of the other shareholders. *Id.*, Ex. C at 52-53.

## 17 II. DISCUSSION

### 18 A. Arbitrability

19 Arbitrability is a question for the courts to decide. *Bridge Fund Capital Corp. v.*  
20 *Fastbucks Franchise Corp.*, 622 F.3d 996, 998 (9th Cir. 2010) ("The arbitrability of a  
21 particular dispute is a threshold issue to be decided by the courts, unless that issue is  
22 explicitly assigned to the arbitrator"). Further, "[q]uestions of arbitrability" – such as

1 whether an arbitration agreement exists and whether an arbitration clause covers the  
2 dispute in question – are issues “for judicial determination unless the parties clearly and  
3 unmistakably provide otherwise.” *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79,  
4 83 (2002) (citing *AT&T Techs., Inc. v. Commc’n Workers of America*, 475 U.S. 643, 649  
5 (1986)). “[A]rbitration is a matter of contract and a party cannot be required to submit to  
6 arbitration any dispute which he has not agreed so to submit.” *United Steelworkers of*  
7 *Am. v. Warrior & Gulf Navig. Co.*, 363 U.S. 574, 582 (1960). However, when an  
8 agreement to arbitrate exists, federal courts have long recognized and enforced a “liberal  
9 federal policy favoring arbitration agreements.” *Moses H. Cone Mem’l Hosp. v. Mercury*  
10 *Constr. Corp.*, 460 U.S. 1 (1983).

11 As Mrs. Curwen notes, the arbitration provision in the Shareholder Agreement  
12 relied on by Defendants in this case invokes Washington state law and therefore,  
13 Washington’s codification of the Uniform Arbitration Act applies. *See* Dkt. 20, Ex. C at  
14 49 (provision states that disputes are subject to arbitration under the provisions of  
15 Chapter 7.04 RCW”). However, because federal law and Washington law are the same  
16 on the issues involved in Defendants’ motion, specifically, that a court is to decide  
17 whether an agreement to arbitrate exists or whether a matter is subject to an agreement to  
18 arbitrate, for purposes of deciding Defendants’ motion, the Court relies on federal case  
19 law.

## 20 **B. Defendants’ Motion to Compel Arbitration**

21 Defendants, in their motion to compel arbitration, argue that Mrs. Curwen’s claims  
22 are subject to arbitration based on the following: (1) Mrs. Curwen’s signing of the

1 consent to the Shareholder Agreement that contains an arbitration provision; (2) the  
2 existence of Mr. Curwen's pending case in which his "related" claims have been sent to  
3 arbitration by the state court; and (3) the existence of other pending cases involving  
4 similar claims that are subject to arbitration.

5 **1. Arbitration Provision in the Shareholder Agreement**

6 Paragraph 16 of the Shareholder Agreement states:

7 Any disputes arising out of the interpretation or enforcement of any of the  
8 terms and provisions of this Agreement shall be subject to arbitration under  
9 the provisions of Chapter 7.04, RCW provided that reasonable discovery  
10 shall be allowed under the provisions of the Civil Rules 26-37 of the  
11 Washington Court Rules, as now enacted or as hereinafter amended. The  
12 venue of any such proceeding shall be in Pierce County Washington.

13 Dkt. 20, Ex. C. at 49. Based on this provision in the Shareholder Agreement, to which  
14 Mrs. Curwen signed a consent form, and the principle that arbitration agreements are  
15 favored, Defendants argue that Mrs. Curwen's claims against them are subject to  
16 arbitration.

17 Mrs. Curwen maintains that her claims against Defendants do not arise out of the  
18 Shareholder Agreement and therefore are not subject to arbitration. In her opposition to  
19 Defendant's motion to compel, Mrs. Curwen states:

20 Mrs. Curwen does not allege breach of the shareholder agreement. Her  
21 claims do not require interpretation or enforcement of any of the  
22 shareholder agreement's terms. Mrs. Curwen's claims are based purely on  
the employer-employee relationship she had with Gierke Curwen, a subject  
that the shareholder agreement does not cover. It bears repeating that the  
other spouses who signed the same "consent" were not employees of the  
firm. Curwen Decl. ¶ 14. As Mrs. Curwen states, "The consent form[s]  
clearly deal[] with our husbands' status as shareholders only and are  
designed to protect the other shareholders in the event of a divorce or the

1 death of a married shareholder. That is not the situation presented here.”  
2 *Id.*

3 Dkt. 19 at 4. The Court agrees with Mrs. Curwen. While arbitration agreements are  
4 favored, Mrs. Curwen “cannot be required to submit to arbitration any dispute which  
5 [s]he has not agreed so to submit.” *United Steelworkers*, 363 U.S. at 582. In signing the  
6 Shareholder Agreement, Mrs. Curwen agreed to submit to arbitration “disputes *arising*  
7 *out of* the interpretation or enforcement of any of the terms and provisions” of the  
8 agreement. Dkt. 19 at 4 (emphasis added). Mrs. Curwen’s claims against Defendants  
9 arise out of her employment with the firm, not her position as a spouse of one of the  
10 firm’s shareholders. *See* Dkt. 1 (alleging claims against Defendants for discrimination,  
11 unlawful retaliation, wrongful termination, outrage, whistleblowing and breach of  
12 contract). Accordingly, Mrs. Curwen cannot be compelled to submit those claims to  
13 arbitration based on the arbitration provision in the Shareholder Agreement.

## 14 **2. Judicial Estoppel and Stare Decisis**

15 Defendants argue that principles of judicial estoppel should prevent Mrs. Curwen  
16 from arguing that her claims are not arbitrable in this case. First, Defendants contend that  
17 because Mr. Curwen’s claims in a pending case are subject to arbitration under the  
18 Shareholder Agreement and Mrs. Curwen signed that agreement which states that she  
19 agrees “to be bound by the terms and provisions of the [Shareholder Agreement], to the  
20 same extent that [her] spouse is bound by the terms and provisions thereof,” (Dkt. 19, Ex.  
21 C) her claims are also subject to arbitration. *See* Dkt. 17. However, the Court concludes  
22 that judicial estoppel does not apply.

1 “Judicial estoppel is an equitable doctrine invoked by a court at its discretion.”  
2 *United States v. Ibrahim*, 522 F.3d 1003, 1009 (9th Cir. 2008) (internal quotation marks  
3 and citations omitted). The Ninth Circuit, in determining whether to apply the doctrine,  
4 typically considers the following: “(1) whether a party's later position is clearly  
5 inconsistent with its original position; (2) whether the party has successfully persuaded  
6 the court of the earlier position, and (3) whether allowing the inconsistent position would  
7 allow the party to derive an unfair advantage or impose an unfair detriment on the  
8 opposing party.” *Id.* (internal quotation marks omitted).

9 The fact that Mrs. Curwen signed the consent to the Shareholder Agreement  
10 means that she agrees to be bound to the same extent as Mr. Curwen for any interest or  
11 claims she may have *arising under the Shareholder Agreement*. Defendants have failed  
12 to show how Mrs. Curwen's consent to that agreement and Mr. Curwen's submission to  
13 arbitration of his claims that do *arise under the Shareholder Agreement* somehow invoke  
14 estoppel to require Mrs. Curwen to submit to arbitration her claims arising out of her  
15 employment with the firm. Judicial estoppel does not apply because Mrs. Curwen has  
16 not stated a position that is inconsistent with an original position. Rather, she has chosen  
17 to pursue her claims arising out of her employment with the firm in this Court instead of  
18 through arbitration. This position is not inconsistent with her husband submitting claims  
19 to arbitration that arose under the Shareholder Agreement that contained a mandatory  
20 arbitration provision. The fact that Mr. and Mrs. Curwen's claims may be similar, or the  
21 fact that they have an interest in the outcome of each other's claims as a married couple,  
22

1 does not change the fact that Mr. Curwen's claims arise under the Shareholder  
2 Agreement and Mrs. Curwen's do not.

3 Defendants also argue that Mrs. Curwen's claims should be subject to arbitration  
4 under the principle of stare decisis because "[a]rbitration has already been ordered in two  
5 related cases involving the same and similar claims, arbitration provisions, and parties."  
6 Dkt. 17 at 8. However, as the Court explained above, the fact that Mr. Curwen's claims  
7 are subject to arbitration pursuant to the provision in the Shareholder Agreement does not  
8 require Mrs. Curwen to arbitrate claims that do not arise out of that agreement. Similarly,  
9 the fact that other employees with claims similar to Mrs. Curwen were also required to  
10 arbitrate pursuant to arbitration agreements they signed does not require Mrs. Curwen to  
11 arbitrate her claims where she did not sign an agreement.

12 The doctrines of judicial estoppel and stare decisis do not apply. Arbitration  
13 requires consent and Mrs. Curwen cannot be compelled to arbitrate disputes to which she  
14 did not agree to submit to arbitration.

### 15 **III. ORDER**

16 Therefore, it is hereby **ORDERED** that Defendants' motion to compel arbitration  
17 (Dkt. 17) is **DENIED**.

18 Dated this 13th day of December, 2011.

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21 BENJAMIN H. SETTLE  
22 United States District Judge